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Supreme Court of the United States

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OCTOBER TERM, 1942.

THOMAS J. PENDERGAST,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

No. 183.

ROBERT EMMETT O'MALLEY,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

No. 186.

**REPLY BRIEF IN SUPPORT OF PETITIONS FOR WRITS
OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT ON
BEHALF OF PETITIONERS, THOMAS J. PENDERGAST
AND ROBERT EMMETT O'MALLEY.**

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STATEMENT OF THE CASE.

Counsel suggest that petitioners omitted pertinent facts. The facts thus allegedly omitted are not specified.

Petitioners, to avoid controversy, digested, rather than construed, the testimony of McCormack (Pet. for Cert. pp. 4, 5). That digest on examination will be found to be accurate; no omissions or inaccuracies are suggested by counsel. The testimony of that witness is the only evidence relied upon by the United States as connecting petitioners with the contempt sought to be charged.

The argumentative statement of counsel, in so far as it purports to supplement the factual statement of petitioners, is constituted of (a) the argumentative and prejudicial conclusions and inferences of counsel purportedly based on the testimony of McCormack but actually misconstruing or overstating such testimony, (b) asserted facts appearing in opinions of the trial court (and of individual members thereof) in this and other proceedings, unsupported by proof in this record, and (c) matters (e.g., proceedings in open court, and briefs and representations of counsel incident to the procurement of the decree of February 1, 1936) allegedly judicially noticed by the trial court with the limitation (R. 924), however, that they should not be considered "to connect the defendants with the contempt charged" (although now sought to be utilized by counsel solely for that prohibited purpose) which have never been incorporated in any bill of exceptions. The foregoing assertion will be verified by the record references cited by counsel. Facts, conclusions, argument, and references to opinions below are inextricably intermingled. We invite a comparison of the actual testimony of McCormack with the statements of counsel predicated thereon (Brief in opposition, pp. 4, 5, 6, 8, 9, 41, 15, 46; R. 694, *et seq.*; Pet. for Cert. pp. 4, 5). It is, furthermore, a novel doctrine that judicial opinions are proof of the facts therein argumentatively asserted; the contrary rule was recognized by the trial court (R. 631). We know of no authority, moreover, authorizing counsel to utilize matters, judicially noticed for a limited purpose, to convict petitioners of the contempt charged, when

such matters appear in no bill of exceptions, and when use thereof for that purpose was, by the court defining the scope and limits of its judicial notice, specifically prohibited.* No pertinent facts in evidence were omitted by petitioners.

Certain statements of counsel must be specifically controverted. Thus counsel in opposition (p. 44) state that petitioners do not challenge the sufficiency of the information; petitioners did and do challenge the sufficiency of the information; having filed an appropriate motion to quash, having contended before the court below that the acts charged did not constitute misbehavior in the presence of the court or near thereto, and having specified before this Court error upon that ground (Pet. for Cert., pp. 2, 8, 16). Counsel further state (in an attempt to avoid the binding effect of petitioners' agreement with the United States) that Mr. Phelps, the acting district attorney, was requested to prosecute these proceedings as *amicus curiae* (p. 55). This is inaccurate. The request made was not to Mr. Phelps, as *amicus curiae*, but as United States District Attorney. The Presiding Judge inquired if the office of the United States District Attorney was willing to assume the duties of prosecution (R. 809). As a result the information was filed in the name of the United States by the United States Attorney in his official capacity and upon his official oath (R. 1).

*These proceedings were judicially noticed only "for the limited purpose of ascertaining in this incidental proceeding the character of those cases and their status and condition on and prior to February 1, 1936" (R. 66). The trial court further limited the matter judicially noticed (R. 924):

"* * * the court takes judicial notice of proceedings, records and files in those cases in so far only as that is necessary to support the Findings of Fact touching this status and condition on and prior to February 1, 1936, but not, of course, to connect the defendants with the contempt charged." (Italics ours).

Petitioners did not omit, but referred to, these matters thus judicially noticed (Pet. for Cert., p. 27).

Counsel inject a novel note by the suggestion, utterly unsupported by proof, that the allegedly unaccomplished object of petitioners was the collection of the remainder of the Pendergast fee (p. 14). This is plainly erroneous. Street, who had made the prior payments in 1935 and 1936, was long dead. In point of fact, there is not the slightest evidence that either petitioner, after October 1936, requested, received or anticipated further payment. Aside from the sum reserved under the decree of February 1, 1936 "for the purpose of taking care of the future expenses of the custodian and other matters", there was nothing "left undistributed under the forthwith provision of the decree to the trustees or to the companies" (R. 781). The implication is (and there is no proof to the contrary) that the distribution to the companies and to the trustees for the companies was expeditiously made upon the entry of the decree of February 1, 1936. Counsel reiterate that McCormack committed perjury before the 1939 grand jury in connection with the investigation of alleged tax evasion in an effort to conceal these transactions (pp. 14, 15, 46). When we turn to the record, however, we find merely (and this was all the proof) that, on his first appearance before that body, he did not tell "them the story of this transaction as you have told from the witness stand this afternoon" (R. 718). Objection to this meaningless, incompetent conclusion was overruled (R. 718). Consistent, as it was, with refusal to testify on constitutional grounds, with failure to detail the transactions so circumstantially as from the stand, or upon a multiplicity of other hypotheses, all consistent with innocence, this vague, indefinite response cannot support the conclusion of counsel that he committed willful perjury. Similarly is the repeated statement of counsel that O'Malley importuned McCormack to commit perjury to conceal the corruption of the insurance settlement, allegedly pursuant to an original agreement, unsupported by proof. McCormack repeatedly testified (as a government witness) that there never was such an agreement

(R. 728, 729, 730), and that O'Malley merely expressed the hope that his name would not be brought into the matter (R. 721). The grand jury was investigating alleged income tax evasion on the part both of Pendergast and O'Malley; had McCormack acted on this hope of O'Malley thus expressed, and kept his name out of the matter, the payments to Pendergast would nevertheless have been disclosed. Counsel upon that evidence alone argue that this action of O'Malley was an overt act pursuant to an original conspiracy; and this in the face of the contrary affirmative evidence of their own witness. It would have been a strange agreement for Pendergast to have made: that O'Malley's, but not his, name should be kept out of the matter! It is significant that O'Malley did not base his hope on any prior arrangement, express or implied; his importunities were obviously not referable to any agreement but were the spontaneous expression of self interest. Similarly, if McCormack had committed perjury, that perjury (even had he not denied the existence of any agreement to that end) would not establish that his action was referable to an original conspiracy so to do; when he disclosed these transactions, he convicted himself of tax evasion, and self interest again would furnish full, adequate and logical explanation therefor. The proof affirmatively negatives the existence of a conspiracy to conceal by affirmative acts, and disproves the argumentative suggestion that any act of O'Malley or McCormack in 1939 was an overt act pursuant to such a prearrangement; Pendergast significantly was not consulted; and the alleged acts are clearly referable to present motives of self interest and are not chargeable to Pendergast or to any concert of action of any character.

Other factual inaccuracies in the argument of counsel will be noted under appropriate assignments.

ARGUMENT.

Prefatory Comment.

We suggest that counsel in opposition have misconceived the issue presently presented. They have extended their argument by briefing the merits rather than the propriety of certiorari. The issue of conflict in decisions is substantially ignored. This is graphically demonstrated in their argument under the first assignment (pp. 22-39) wherein the discussion of conflict is relatively insignificant (pp. 33-35, 38). Similarly, under other assignments, counsel brief not the issue of conflict but the question whether the opinion below, even if in conflict, can be sustained upon other grounds unspecified in such opinion. We apprehend that that is not the issue; we shall nevertheless meet the arguments advanced.

Another false issue injected into these proceedings by counsel is petitioners' alleged silence upon the accusations of misconduct. Counsel resort to an appeal to prejudice rather than to reason. Petitioners are denounced as scoundrels. No abusive adjective in the vocabulary of vituperation is left unused. When a court is passing upon the purely legal issue of whether or not a given person is shown to have been guilty of a particular offense, it is of doubtful aid to the court, and of questionable propriety in argument, for counsel seeking conviction vehemently to assure that court that the particular person is a villain. Here, as yet, not even that issue is presented; we are now dealing solely with the propriety of certiorari to review the opinion below. Hence assertions "that petitioners make no pretense of innocence", that a "corrupt conspiracy is not denied", and that "bribery of O'Malley, and his betrayal of public trust * * * is not denied" (p. 21) beg the question. We submit further that the exhortation "that these guilty men should not escape

punishment" (p. 61) is utterly out of place in the discussion of the issue before this Court. The dissenting opinion below properly characterized appeals of this character (R. 1206, 1207, 1210, 1212).

POINT I.

The Conduct of Petitioner Did Not Constitute Misbehavior on His Part in the Presence of the Court or So Near Thereto As to Obstruct the Administration of Justice, Within the Meaning of Section 268 of the Judicial Code (28 U.S.C.A., Sec. 385), and Did Not Render Him Punishable for Contempt upon Information; the Majority Opinion Below (Riddick, J., Dissenting), in Holding Him Thus Punishable Therefor, Is in Conflict with Applicable Decisions of This Court and with Decisions of Other Circuit Courts of Appeals on the Same Matter.

Counsel in opposition purport to meet this proposition by misstating it (p. 22). Petitioners stated (Br. p. 21): "There are, therefore, two prerequisites to prosecution for contempt upon information: (a) the actual presence of the person charged at the time of misbehavior before the court or in immediate geographical proximity thereto; (b) disruptive misbehavior on his part when thus present." The issue, therefore, is not whether petitioners were present in court when counsel made certain representations; the issue is whether petitioners were in court at the time they committed the misconduct or misbehavior charged. Disruptive behavior is, moreover, not limited to noise or disorder; it extends to any conduct before the court 'disrupting its quiet and order or actually interrupting the court in the conduct of its business.' *Nye v. United States*, 313 U. S. 33, 1.c. 52. Under the latter authority it is plain that the filing of a pleading, even in consummation of a previously perpetrated fraud, satisfies neither of the prerequisites specified.

Counsel spend scant space (although such is the only present issue) in attempting to deny the conflict of

the opinion below with the *Nye, Wimberly, and Warring* cases. We note the suggested distinctions: *First*: That, although under the theory of counsel Nye was guilty of misbehavior in the presence of the court, this Court overlooked this circumstance and, in discharging Nye as guiltless of contempt, committed inadvertent error in considering only the phrase "so near thereto" and overlooking the companion phrase "in their presence." Such an argument requires no answer. *Second*: That Nye overreached Elmore, but not the court. This contention is so completely answered by the dissenting opinion below that no further discussion is necessary (R. 1211, 1212). *Third*: That the misconduct of Nye did not occur in open court. The misconduct of petitioners did not occur in open court. In both cases the misconduct occurred elsewhere; in both cases the misconduct, occurring elsewhere, was sought to be consummated by a pleading presented to the court with representations, express or implied, of good faith in so doing. In both cases the pleading presented was rendered improper by reason of previous misconduct. In the *Nye Case* the motion to dismiss (in letter form) would admittedly have been noncontemptuous had it not been for the previous misconduct; in the instant case the motion to dismiss and for decree would have been, admittedly noncontemptuous had it not been for the previous misconduct. The parallel is unmistakable. The "evil influence" in both cases is identical; in both cases that influence was brought to bear at points remote from the court room. This court, however, pointed out in the *Nye Case* that the circumstance that the perpetrated fraud was sought to be consummated by such a pleading presented to the court was "inconsequential" (l. c. 52). *Fourth*: That Nye did not appear in court by counsel. Under the theory of counsel, however, both Nye and Pendergast would be held to have contemplated the necessary appearance of counsel in open court in consummation of their misconduct. *Fifth*: That the misconduct of

Nye was not contemptuous because it occurred before answer, and that dismissal could have been accomplished without judicial order. Dismissal in the instant case could have been accomplished without judicial order. *Aetna Insurance Co. v. O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, l.c. 9, 10; *State ex rel. v. Dinwiddie*, 343 Mo. 589, 122 S. W. (2d) 912. Hence, in the instant case, appearance in the presence of the court was neither necessary nor contemplated by Pendergast. Sixth: That if the innocent emissary presenting (for ultimate consummation of the previously perpetrated fraud) a pleading to the court is a layman, those guilty of misconduct are not guilty of contempt, but, if such emissary is a member of the bar, they are guilty of contempt. We fail to recognize the distinction. In each instance such presentation is material only under the theory of constructive presence; the professional qualifications of the emissary are manifestly immaterial. It is even suggested, in this connection, that there is a vital distinction between the delivery of a pleading to the court and the delivery of a pleading to the secretary of the court for redelivery to him. We again fail to recognize the distinction. In the *Nye Case* the court received the motion (*Nye record*, p. 154; 313 U.S. 33, l.c. 52), and acted thereon in his judicial capacity. Each of the foregoing distinctions is, in the words of the late Professor Dicey, "a distinction without a difference." We do not assume that this Court, in determining a basic governmental principle in the *Nye Case*, intended the determination thereof to depend upon insignificant circumstances such as the foregoing. We refer to the dissenting opinion below in this connection (R. 1211). In conclusion we suggest that it ventures upon presumption to suggest that this Court in the *Nye Case* construed only the phrase "so near thereto" and overlooked the companion phrase "in their presence." Certainly the circumstance that in the one instance (the *Nye Case*) the fraud was unsuccessful, and in the other instance temporarily successful, is of no consequence. Consider the final absurdity: That

the determination of a great governmental principle should turn upon the fortuitous circumstance of whether action by counsel in open court was directed or merely contemplated as an inescapable incident, of whether a dismissal sought pursuant to a previously perpetrated fraud was before or after answer, of whether an innocent emissary was a member of the bar, or of whether a given pleading was delivered directly to the judge or to his secretary for redelivery to him. Counsel seek to emphasize that O'Malley agreed in writing that the settlement should be presented to the court. The conspirators in the *Nye Case* agreed that the results of their fraud should be presented to the court, and, in fact, themselves mailed the motion directly to the court. Do counsel detect any significance in the circumstance that the agreement in one instance was in writing and in the other oral? We submit that the purported distinctions are hypertechnical quibbles.

The claimed absence of conflict between the opinion below and the *Wimberly* and *Warring* cases is supported only by the ipse dixit of counsel. Nevertheless, in *Wimberly v. United States*, 119 Fed. (2d) 713, 1c. 714, as part of the *ratio decidendi*, the court remarked:

"The gist of the decision (in the *Nye Case*) is that if the misconduct does not disrupt quiet and order or actually interrupt the court in the conduct of its business, the offender may not be summarily punished for contempt."

It is conceded in the instant case that no misconduct shown *did* disrupt quiet and order or actually interrupt the court in the conduct of its business. The conflict is unmistakable. Counsel in opposition, moreover, cannot reconcile the excerpt quoted from the *Wimberly* case with their own position in this proceeding (pp. 36, 37, 38). The reasoning in the *Warring* case (122 Fed. (2d) 642) is equally in conflict with the opinion below. To demon-

strate, moreover, the inevitable confusion in the law unless the opinion below is reviewed, we quote from *Millinocket Theater v. Kurzon*, 39 Fed. Supp. 979, 1.c. 980:

"Contempt under this section must be 'misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business.'"

Nothing could be more demonstrative of the inevitable confusion in the law, if the opinion below is not reviewed, than the persistent contention of counsel in opposition that the instant proceeding is ruled by *Sinclair v. United States* (279 U. S. 749). Counsel vehemently assert that that decision remains the law; yet that decision was bot-tomed squarely upon the *Toledo Case* and its now ex-ploded doctrine (1: c. 765):

"The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly they were not less remote than the publica-tion denounced in *Toledo Newspaper Co. v. United States*."

Other contentions of counsel have been anticipated by petitioners. It may be noted that counsel argue prior authorities (*Savin Case*, 131 U. S. 267, *Cooke Case*, 267 U. S. 517, *Sinclair Case*, 279 U. S. 749) at some length. The *Nye Case* is now the law, and it is futile to argue prior decisions under exploded doctrines. The prior au-thorities cited, however, are distinguishable from the case at bar. In the *Savin Case* a witness was intimidated upon the very premises of the court; whether the court personally was aware thereof at the time, such intima-tion, to say the least, was not conducive to order or decorum in the court room. The statement in the *Cooke Case* to the effect that the delivery of a scurrilous letter was contemptuous was plainly dictum; the conviction was reversed under principles of due process. It may be noted, moreover, that in that case the letter was delivered

by a party to the alleged contempt, and not by an innocent messenger. The opinion does not disclose whether Cooke accompanied him to the premises of the court. The *Sinclair Case* was only referred to in the Nye opinion (l. c. 49) in connection with the statement that given misbehavior, falling within the definitions of both the first and second sections of the Act of 1831, may be summarily prosecuted. That decision is plainly no longer the law. There an investigation of incumbrances upon the property of jurors was, under the *Toledo Case* doctrine, held contemptuous; since the Nye opinion no one would argue that such acts constituted contempt. It could be argued that in each of the foregoing authorities, however, actual misbehavior occurred in the presence of the court; in the instant case no misbehavior there occurred. A discussion of such authorities is now, however, academic. The *Nye Case* controls the instant case; neither under the facts nor the law can a substantial distinction between them be pointed out.

Counsel argue earnestly that the doctrine, that misbehavior, to constitute contempt, must involve disorder or breach of decorum, is predicated exclusively upon dictum in *Ex Parte Robinson*. It is conceded that no disorder or breach of decorum occurred in the instant case. It is unnecessary to consider here whether it is not arguable that intimidating a witness (*Savin Case*), shadowing jurors (*Sinclair Case*), or delivery of scurrilous letter by a party thereto, with possibly the same effect as if the denunciatory language were then verbally spoken (*Cooke Case*), constitutes misbehavior involving a breach of decorum in the court room with or without disorder. Such conduct at least would not be construed as conducive to decorum. Hence these authorities can be reconciled with the doctrine that for punishable contempt there must be disorder or breach of decorum. If they cannot be so reconciled, they are no longer the law. The doctrine of *Ex Parte Robinson*, which but reiterated a principle earlier

declared in *Ex Parte Poulson*, was reaffirmed in the *Nye Case* (1. c. 52):

"It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business."

Counsel argue, however, that in the instant proceeding there was an interruption of the orderly conduct of the business of the court. The same argument was made by the Circuit Court of Appeals in the *Nye Case* (113 Fed. (2d) 1006, 1. c. 1008), but was rejected by this Court. As a result, when in the instant case there was neither disorder, breach of decorum, nor interruption in the business of the court, there was plainly no misbehavior in the presence of the court within the authoritative interpretation of that term.

We shall discuss in the next succeeding assignment the persistent confusion of counsel between the offenses of conspiracy and contempt. In dealing with contempt, we are not dealing with conspiracy. Conspiracy to commit misbehavior does not constitute contempt. If the misbehavior occurs, it is contempt irrespective of prior conspiracy. The contrast between conspiracy and contempt may be illustrated by the circumstance that a conspiracy under Section 19 of the Criminal Code might involve an overt act constituting a contempt. If the overt act in question were not committed, the conspirators could nevertheless be prosecuted for conspiracy; if the overt act were committed, the persons committing it could be prosecuted for contempt, and, if they had committed the act, their guilt would in no sense be dependent upon the prior conspiracy. The gist of conspiracy is the unlawful agreement; the gist of contempt is the unlawful act. Hence counsel, when they refer to conspiracy, overt acts, and their incidents, are using a terminology entirely inapplicable to contempt.* The test of contempt punishable

*It will be pointed out under the next assignment that, when counsel embrace the theory of conspiracy as the contempt charged,

upon information is not one involving either conspiracy or overt acts; that test, plainly and simply, is whether there has been misbehavior on the part of the accused in the presence of the court or so near thereto as to obstruct the administration of justice.

POINT II.

The Prosecution of Petitioner under the Information Was Barred by the Statute of Limitations, and Laches, Since Any and All Acts of Alleged Contempt Occurred More Than Three Years Next Before the Filing of the Information; the Majority Opinion Below, in Holding That the Prosecution Was Not Thus Barred, and in Further Ruling That the Appropriate Statute of Limitations (R.S., Sec. 1044; 18 U.S.C.A., Sec. 582) Was Inapplicable to This Proceeding Either by Analogy or Enactment, Is in Conflict with Applicable Decisions of This Court, or, If the Ruling Below Is Not in Conflict with Decisions of This Court, As Petitioner Contends, Such Majority Opinion Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Under this assignment counsel again seek to support the opinion below upon grounds other than therein stated. The conflict between that opinion and the *Gompers Case* (233 U. S. 604, l.c. 610) is not discussed. The assertion is made that no statute of limitations applies to criminal contempt, citing *State ex rel. v. Barlow*, 132 Nebr. 166, 271 N. W. 282, the only authority in this country to that effect, which is opposed not only to the *Gompers Case* but to all other authorities upon that issue (Pet. for Cert.

they thereby abandon their theory (relied upon to avoid the effect of the Nye opinion) that the misbehavior occurred in the presence of the court. If the conspiracy constitutes the alleged contempt, it concededly did not occur in the presence of the court. Irresistibly, therefore, must the conclusion follow under the Nye opinion that no contempt is shown.

p. 36). The phrase in the Gompers opinion, "in the presence of the court", was discussed at length by petitioners (Pet. for Cert. p. 35 et seq.). That discussion is ignored by counsel. Counsel, therefore, basing their argument upon neither principle nor authority, submit that one form of criminal contempt is an offense within the meaning of the appropriate statute of limitations, but that another form of criminal contempt is not. If criminal contempt is an "offense" within the meaning of the statute of limitations, as held in the *Gompers Case*, it is difficult to understand how the place of its occurrence could affect its character. If criminal contempt is an offense, then it is equally an offense wherever committed. That proposition is too plain to require argument.

Counsel further urge, without the support of authority, that, even if the three-year statute of limitations is applicable, the statute had not run in the instant case because the trial court had not abandoned complete jurisdiction therein. Counsel state (p. 4) that the "contempt consisted in fraudulently foisting upon the District Court a corrupt settlement of certain insurance rate litigation." The presentation of the settlement to the court occurred in 1935 and culminated in a final decree of February 1, 1936. Under the theory of counsel, therefore, the offense occurred more than three years next before the filing of the information. If the statute of limitations is applicable, then manifestly it began to run upon the commission of the offense. Upon what theory, by what authority, can counsel suggest that the continued reservation of jurisdiction after the date of the decree for limited purposes operated to toll the statute? Former discussion will not be repeated (Pet. for Cert. pp. 37, 38).

Counsel finally argue that the contempt was constituted of a conspiracy, and that no statute of limitations could run so long as the conspiracy continued. This is an attempt to bolster up the opinion below upon grounds other than those stated therein. It is an argument di-

rected to the merits; and not to the propriety of certiorari. It convicts counsel, however, of manifest inconsistency. Under the preceding assignment (in an attempt to avoid the effect of the Nye opinion) counsel argued that the only contempt sought to be charged was misbehavior in the presence of the court; under this assignment (in an attempt to avoid limitations) counsel argue that the contempt sought to be charged is conspiracy. Admittedly no conspiracy occurred in the presence of the court. These two positions cannot be reconciled; the two theories are diametrically opposed. They now contend that the offense charged is not misrepresentations in open court, but "a single continuing conspiracy, which was carried out partly in court and partly out of court" (p. 47). Since the statute of limitations is plainly applicable to the offense charged, counsel are confronted with this dilemma even upon the premise of their own theories: If the contempt sought to be charged is a continuing conspiracy, then it is not misbehavior in the presence of the court or in the required proximity thereto and is not punishable upon information in this proceeding; if, on the other hand, the contempt sought to be charged is constituted of acts of misbehavior in the presence of the court, then this prosecution is barred, since all such alleged acts admittedly occurred more than three years next before its institution. Counsel cannot change the form of the offense sought to be charged to meet the changing exigencies of different issues. No authority sustains the view that a conspiracy with overt acts in and out of court constitutes a single continuing contempt, i.e., misbehavior in the presence of the court.

Counsel concede that no act of misbehavior in the presence of the court occurred within three years next before the institution of this proceeding. Under their theory the last of such acts occurred in 1935. The decree approving the settlement was entered on February 1, 1936. Three years thereafter passed without any act on

the part of either petitioner in or out of court. Any prosecution for claimed contempt was, therefore, barred before the time that O'Malley allegedly importuned McCormack or the latter allegedly committed perjury before the grand jury. As to the facts in this connection see the Statement, *supra*. Neither the alleged importunity of O'Malley nor the alleged perjury of McCormack is claimed to have constituted contempt of the three-judge court. Upon what theory under such circumstances can counsel argue that noncontemptuous acts in 1939 revived a contempt prosecution already barred by the statute of limitations? No authority has been, or can be, cited to sustain such a proposition. Counsel purport to cite the Sinclair Case (279 U. S. 749). The statute of limitations was not there involved. Specific, particular acts of misbehavior, and not conspiracy, constituted the contempt there charged (l.c. 764, 765). This Court did not in that authority proceed upon the theory that the acts in the court room brought all acts, there and elsewhere, within the statute; to the contrary, upon the authority of the Toledo Case, all acts, in the court room and remote therefrom, were held to constitute misbehavior in the presence of the court or in the required proximity thereto (l. c. 765). Undeniably the remote acts could not constitute contempt since the Nye opinion. Such a theory as that advanced by counsel could not be tolerated. If one act in the presence of the court brought all acts (the others committed at points remote from the court) within the statute and rendered them punishable by summary process, then manifestly, in violation of the statute, the power to punish contempts would be extended to cases other than misbehavior in the presence of the court or near thereto. Hence it is readily apparent that the theory of conspiracy cannot be utilized to convert a series of acts, some in the presence of the court or near thereto, others remote therefrom, into a single continuing contempt, since so to do would subject an accused to punishment for the remote acts (as part of the continuing offense) which

did not constitute misbehavior on his part in the presence of the court or near thereto; the restrictions and prohibitions of the Act of 1831 cannot be thus flouted.

The foregoing proposition is fully sustained by authorities. In the *Hart Case* (27 Fed. Supp. 713, l.c. 716) the court pointed out that a claimed conspiracy to conceal an offense could not be contemptuous. In the *Doniphan Case* (179 Fed. 173, l.c. 174) the fundamental distinction between conspiracy on the one hand and contempt upon the other is clearly defined. The controlling authority is the opinion of Mr. Justice Holmes in the *Gompers Case* (233 U. S. 604, 58 L. Ed. 1115). There a number of contemptuous acts were charged, some prior to, some during, the three-year period immediately before the filing of the information. There, as here, the government sought to use the theory that the series of acts constituted a continuing offense by reason of a continuing conspiracy. Mr. Justice Holmes rejected the contention, and pointed out the distinction between conspiracy and contempt (l.c. 610). *He held that acts prior to the three-year period before the institution of the proceeding could not even be taken into consideration* (l.c. 613). He furthermore reversed the conviction, although certain of the contemptuous acts had occurred during the three years immediately before the filing of the information, upon the ground that no conviction could stand when based "mainly upon offenses that could not be taken into consideration" (l.c. 613). This is necessarily the law, since the statute of limitations provides that no person "shall be prosecuted, tried or punished" for any offense occurring more than three years before the information (R. S. Sec. 1044; 18 U.S.C.A., Sec. 582). That these petitioners are sought to be punished for acts occurring more than three years next before the filing of the information cannot be challenged. We have, therefore, under the *Gompers* opinion this situation: *There the conviction was based upon a series of contemptuous acts, pursuant to a conspiracy, occurring both prior to and during the three-year*

period immediately before the filing of the information, and it was held that the judgment of conviction could not stand; here, the convictions are based upon allegedly contemptuous acts prior to the three-year period before the filing of the information, and non-contemptuous acts during such period, and a fortiori the convictions cannot stand. To phrase this plain, inevitable conclusion differently: Mr. Justice Holmes held, rejecting the continuing offense theory, that acts prior to the three-year period before the information could not be considered; in the instant case, therefore, no act of either petitioner occurring prior to July 13, 1937 can be considered. As a result, what remains for consideration in this record? Even opposing counsel do not contend that petitioners were guilty of a single act of misbehavior in the presence of the court below or so near thereto as to obstruct the administration of justice after July 13, 1937. The acts of O'Malley and McCormack in March of 1939 related not to the statutory three-judge court of the Central Division therefore exercising jurisdiction in the insurance rate litigation, but to a grand jury of the Western Division investigating income tax evasion. It is undenied, and admitted, that no act of alleged contempt on the part of petitioners is shown within the requisite three-year period next before the filing of the information. Under the Gompers opinion, even if contemptuous acts were shown within the three-year period, these convictions would necessarily be subject to reversal since they are based upon acts prior to such period; when it appears that the only allegedly contemptuous acts upon which the convictions are based occurred more than three years prior to the filing of the information, not only must these convictions be reversed but no convictions can stand. The *Gompers Case* controls, and the opinion below is in unmistakable conflict therewith.

Counsel suggest inferentially, by quoting from the opinion of the trial court, that non-disclosure of the offense, concealment thereof, tolled the statute of limita-

tions. The facts as to alleged concealment have been heretofore reviewed (*supra*, Statement). It is, of course, not the law that non-disclosure or concealment of an offense tolls the statute of limitations. 22 C. J. S., Sec. 231, p. 363; 22 C. J. S., Sec. 228, p. 360; 15 Am. Juris., Sec. 357, p. 37; *Hart v. Oil Company*, 27 Fed. Supp. 713, 1. c. 716; *State v. Nute*, 63 N. H. 79, 1. c. 80; *Commonwealth ex rel. v. Sheriff*, 3 Brewster (Pa.) 394, 1. c. 396; *State v. Locke*, 73 W. Va. 713, 81 S. E. 401, 1. c. 402. Exceptions cannot be judicially written into statutes of limitation. *Commonwealth v. DeMaria*, 110 Pa. Sup. Ct. R. 292, 168 Atl. 320; *United States v. Salberg*, 287 Fed. 208; *United States v. Brown*, 24 Fed. Cas. 1263, Case No. 14665; *State v. Clemens*, 40 Mont. 567, 107 Pac. 896.

We submit that it is plain that under the *Gompers Case* prosecution of petitioners is barred; the opinion below, in ruling otherwise, is in conflict with that controlling authority.

POINT III.

The Conviction Below Should Be Reversed, and Further Proceedings Stayed, for the Reason That the Prosecution of Petitioner under the Information Is in Violation of His Agreement with the United States; and the Majority Opinion Below, in Refusing to Give Effect to Such Agreement, Has Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of This Court or, If Such Ruling Is Not Thus in Conflict, As Petitioner Contends, the Majority Opinion Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Counsel depart from even the pretense of discussing conflict of decisions under this assignment, and attempt to argue (upon the basis of matters not in the instant record) that the agreement, as charged, was not made. We shall not again review the facts (Pet. for Cert. pp. 6, 7, 38, 39, 40). Under the undisputed facts two conclusions are inescapable: (1) That the United States agreed

not to prosecute for alleged contempt, and that the United States Attorney thoroughly understood the agreement; (2) that prosecution by the United States breached that agreement. We have noted heretofore (*Supra*, Statement) that the United States Attorney prosecuted in his official capacity, and not as *amicus curiae*. As we originally suggested, the issue is not whether the United States Attorney bound the statutory court; the issue is that the United States Attorney *did* bind the United States. This is a prosecution by the United States and under its control, and not a prosecution by the trial court initiated by citation. The question whether the trial court could have proceeded independently of the United States is only academic here. It did not do so. The United States prosecuted, and, prosecuting, breached its bond. The ruling below is, therefore, in conflict with the *Ford Case* as charged.

POINT IV.

The Court Below Was Without Jurisdiction to Entertain This Proceeding; and the Majority Opinion Below, in Holding That the Purported Statutory Court Was Vested with Such Jurisdiction, and in Further Holding That the Conviction of Petitioners Was in Any Event Validated by the Fact That One of the Members of Such Court, As Then District Judge for the Central Division of the Western District of Missouri, Issued the Original Restraining Order in the Insurance Rate Litigation, Has Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of This Court.

The conflict with the previous decision of this Court in this particular case is unmistakable. The discussion of conflict need not be prolonged other than to point out that in the claim that lack of jurisdiction did not invalidate the convictions by the three-judge court, counsel ignore the admitted circumstance, conceded by the trial court, that if this prosecution is an independent proceeding, neither the

trial court nor any member thereof had jurisdiction (Pet. for Cert. pp. 42, 43). Counsel now concede that this prosecution is an independent proceeding: Lack of jurisdiction, irreconcilable conflict with the memorandum of this Court, cannot be denied.

Conclusion.

We suggest again that the dissenting opinion below properly stresses the grave public importance of the issues here presented. Review is essential to the orderly administration of justice.

Respectfully submitted,

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